

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

February 18, 2004 Session

IN RE: M.E.W. and J.W.W.

**Appeal from the Juvenile Court for Lincoln County
No. J98-95 Floyd Don Davis, Judge**

No. M2003-01739-COA-R3-PT - Filed April 21, 2004

This appeal involves a petition filed by the Department of Children's Services to terminate the parental rights of Mother to her two minor children. The trial court denied the petition, and the Department appeals. We have determined that the trial court's judgment must be vacated because the trial court failed to make the specific findings of facts and conclusions of law regarding the children's best interest required by Tenn. Code Ann. § 36-1-113(k).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Vacated

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Paul G. Summers, Attorney General and Reporter; Douglas Earl Dimond, Assistant Attorney General, for the appellant, State of Tennessee, Department of Children's Services.

David Kozlowski, Columbia, Tennessee, for the appellee, E. W.

OPINION

At issue is the trial court's denial of the petition to terminate the parental rights of E.W. ("Mother"), in regard to her two minor children, J.W.W., a son born October 8, 1993, and M.E.W., a daughter born April, 9, 1995. In the summer of 1995, the children were removed from Mother's home pursuant to a Petition for Temporary Custody filed by the Department of Human Services (predecessor to the Department of Children's Services("DCS")) and placed in foster care. An adjudicatory hearing in juvenile court was held on August 30, 1995, at which time the trial court found the children to be dependent and neglected because Mother's "mental incapacity renders her unable to properly care for the children." Except for a brief period, the children have remained with the same foster family since their removal, and those foster parents ("Foster Parents") now want to adopt the children.

On June 20, 2001, DCS and the children's guardian *ad litem* petitioned the juvenile court¹ to terminate the parental rights of Mother and the children's fathers.² Mother filed her Answer opposing the termination.

Trial was set for April 14, 2003. At the beginning of the hearing, the trial court informed the parties that he had read all their filings. He also indicated that the proof should not take long and they could expect to finish before lunchtime, later amending that prediction to state that the hearing could conclude by 10:00 a.m. After presentation of the parties' positions, the court got agreement from them as to certain issues: that the mother is presently incapable or incompetent to have the children returned to her and/or to take care of the children; that DCS had done as good a job as it could with regard to reasonable efforts to reunite the family; that Mother had cooperated with DCS; that the children were presently in a good home and being taken care of; that the foster parents had been good custodians and provided good care for the children; and that the children's visits with Mother had gone well. Mother conceded that the "unanimous" proof would be that Mother does not have the mental capacity to adequately raise the children and, further, that she would not ever be able to raise the children.

The parties and the court agreed that the issue for the court to determine was whether termination, and adoption by Foster Parents, was in the best interest of the children. After hearing the presentation of the parties' positions, including their agreements set out above, and proposed evidence (DCS proposed to call eleven witnesses and Mother intended to call four), and stating that he had been correct with regard to the necessary length of the hearing, the court determined there was no need for testimony, with the possible exception of the experts. After a brief recess, the parties and the guardian *ad litem* agreed to enter into stipulations to submit to the court, to take any further expert depositions that might be necessary, and to file those depositions with the court, all according to a deadline established by the court. In other words, the issues were to be submitted to the court without live testimony.

On May 21, 2003, the parties filed the following stipulations:

____ 1. Defendant [Mother] is an adult resident of Madison County, Alabama. [Mother] is the birth mother of [M. E. W.] and [J. W. W.], the children who are the subject of this proceeding. Defendant [Mother] is forty-six years old, having been born on January 21, 1957.

¹DCS moved to recuse Juvenile Court Judge Charles Crawford following the August 28, 2002 conference in which he stated his sympathy for Mother. Specifically, Judge Crawford observed that the case would be difficult to decide because, unlike some other cases, Mother had made real efforts to regain custody of her children, shows love for her children, and never purposefully neglected or harmed her children. On December 4, 2002, Judge Crawford recused himself admitting that he was biased toward Mother and requested the Supreme Court appoint a Special Judge to hear the case. Judge Davis was appointed to preside over the trial.

²On June 2, 2003, the trial court ordered the parental rights of J. W., J. W. W.'s father, terminated. In addition, the order terminated the parental rights of M. E. W.'s unknown father. This appeal does not involve the fathers.

2. [Mother] has given birth to five children, all of whom are still alive. None of the children live with their mother.

3. As detailed in the Mayes Assessment, [Mother] has significant cognitive impairments. These cognitive impairments do not prevent [Mother] from caring for herself; she is able to live on her own without assistance from other adults.

4. Because of her cognitive limitations, defendant [Mother] is not competent to provide for the care and supervision of her children and is not capable intellectually of adequately raising them. Defendant has a very simplistic view of the world. Her cognitive abilities are so limited and likely to remain so that it will not be possible for her to assume care and responsibility for her children in the near future or at any time. Consequently, unless she has a nearly full-time live-in aide, [Mother] will not be able to raise any of her children.

5. These Children, [M. E. W.] and [J. W. W.], have been removed from the home of their mother. . . by order of the Juvenile Court for Lincoln County, Tennessee, for more than seven years. The primary condition which led to the children's removal - the cognitive impairments of the defendant - still persists. This condition, although not willful on the defendant's part, does prevent her from being able to adequately care for and supervise her children and her cognitive impairments will not be changed for the better in the near future.

6. [Mother] has not abused her children and has not done anything on purpose to harm her children.

7. Defendant's eldest son, now twelve years old, was removed from the custody of his mother by the Alabama Department of Human Resources when he was very young. Defendant's parental rights to the eldest son have been terminated, and he has been adopted by a family in Alabama. [Mother] never sees her son and has no contact with him.

8. [Mother]'s eldest and youngest children, [M. W.]³ (age fourteen) and [W. W.] (age three), live with S.M. and her husband in Decatur, Alabama. Over the years Mr. and Mrs. [M.] have been foster parents in Alabama and operated a group home for dependent children. Mr. and Mrs. [M.] are not related to defendant. [M. W.] came to live with the [M.] family when she was a few months old and has been with them since that time. [W. W.] came to live with the [M.] family when he was two or three days old and has been with them since that time. [M. W.] and [W. W.] are not in foster care in the [M.]'s home, and the Alabama Department of Human Resources

³Mother's eldest daughter, has the same initials as her younger daughter who is the subject of this appeal. In an effort to avoid confusion, we will refer to the eldest daughter as M. W.

is not involved in their lives. The [M.] family has legal custody of [M. W.] and [W. W.] by separate orders entered in the Juvenile Court in Alabama.

9. The children who are the subject of this proceeding, [M. E. W.] (eight years old) and [J. W. W.] (nine years old), are currently in the custody of the Tennessee Department of Children's Services. They live in the [Foster Parents'] . . . home in Lincoln County, Tennessee.

10. Defendant [Mother] was living with her mother and brother, and her son [J. W. W.], in southern Lincoln County when her situation came to the attention of the Tennessee Department of Human Services (the predecessor of the Department of Children's Services) in late 1993 or early 1994. Allegations had been made that [J. W. W.] was not being properly cared for. The Tennessee Department of Human Services investigated and provided services, including a homemaker, to defendant [Mother].

11. Problems persisted and the Department of Human Services filed a Petition for Temporary Custody in the Juvenile Court for Lincoln County in the summer of 1995, a few months after [M. E. W.] was born. The Petition asserted that the children were dependent and neglected. At the time that the children were removed from the defendant's home in July of 1995, her son [J. W. W.] was hospitalized from a secondary infection due to scabies and her daughter [M. E. W.] was hospitalized with a diagnosis of failure to thrive; the conditions of both children were a result of [Mother]'s mental incapacity to care for them. On August 30, 1995, an adjudicatory hearing was held in the Juvenile Court of Lincoln County at which time the Court found the children to be dependent and neglected due to [Mother]'s mental incapacity to care for her children. At a subsequent dispositional hearing, the Court determined that the children were appropriately in foster care.

12. [M. E. W.] and [J. W. W.] were placed in the [Foster Parents'] . . . home when they were removed from the custody of their mother in 1995 and have been in that same foster home almost continuously since that time. The children were placed with a maternal aunt in Lincoln County for approximately four months in 1996 or 1997 in an effort to see if a relative placement would be possible; that placement did not last and the children were returned to the [Foster Parents'] . . . home where they have stayed. The Tennessee Department of Children's Services has diligently searched for other relative placements for the children, but there are no relatives of the children who are willing or suitable to care for them.

13. The [Foster Parents] have been married to each other for twenty-eight years and have lived for the vast majority of that time in the same home in Lincoln County.

14. The [Foster Parents] have been foster parents for approximately twenty-three years and have had more than a hundred foster children in their home. As [Foster Mother] stated, they have been foster parents “for the love of the kids.” According to the Tennessee Department of Children’s Services, the [Foster Parents] are excellent foster parents.

15. Since the time that these two children have been in the custody of the Tennessee Department of Children’s Services, the Department (and its predecessor the Tennessee Department of Human Services) has provided services to [Mother]. These services have included homemaker services, assistance with housing, assistance with transportation for the mother to the visits and appointments, a referral to the adult skills program operated by Vocational Rehabilitation in Lincoln County, two parenting assessments, and parenting classes. The Department and [Mother] have entered into permanency plans as required by law and have conducted the required Court reviews, Foster Care Review Board meetings, and staffings.

16. With the exception of failing to maintain attendance at the adult activities center in Lincoln County in 1996, [Mother] has cooperated with the Department of Children’s Services while the children have been in foster care. [Mother] has done what the Department has asked her to do and has attended parenting classes and meetings and staffings that have been scheduled regarding her children. [Mother] has been praised by the Department and the Foster Care Review Board for the efforts that she has made. [Mother] has been polite and friendly to the DCS workers.

17. [Mother] has made improvements in her personal living style since [M. E. W.] and [J. W. W.] were taken from her. For example, her mother’s home, where [Mother] was living when the children were placed in foster care, had very serious health and safety defects. The house in which [Mother] has resided for three to four years in Alabama is a significant improvement. [Mother] has demonstrated an ability to keep the home clean. [Mother]’s personal hygiene is adequate. Because she is disabled based upon her intellectual deficits, defendant [Mother] receives Supplemental Security Income benefits each month of approximately \$550.00. [Mother] does not drive and relies on others to provide her with transportation.

18. Ever since her children have been in foster care, [Mother] has maintained contact with them. No one doubts that [Mother] loves her children. She is concerned about her children. She calls the DCS case manager to check on her children and tells the worker that she loves her children. She expresses and demonstrates love for her children and has called the worker, asking the worker to give her children a kiss for her.

19. [Mother] has consistently visited with her children during the time they have been in foster care in the custody of the Department of Children’s Services. For the

most part, the visits are scheduled twice a month and take place in Fayetteville, Tennessee. [Mother] is responsible for finding her own transportation to Fayetteville for the visits. If [Mother] is unable to attend a visit because of a personal problem or lack of transportation, she will call and reset. The visits mostly take place at the DCS office in Fayetteville although some visits have been held in a park or at a fast food restaurant such as McDonald's. The visits are supervised or at least observed by an employee of the Department of Children's Services.

20. According to one of the recent DCS case managers, all of the visits between mother and children go well. [Mother] shows affection for her children during the visits and mother and children exchange hugs and kisses during the visits. The defendant has brought gifts to her children at times like Christmas and birthdays. [Mother] is able to properly control the children during the visits and they are not behavior problems in the DCS office.

21. [J. W. W.] and [M. E. W.] are not reluctant to go to the visits and the children have fun, according to the DCS workers, during the visits. At one point, [M. E. W.] was reluctant to come to the visits, but does not display this reluctance any longer. The children interact well with their mother. On occasion, [M. E. W.] has laid in her mother's lap during the visits.

22. In July of 2002, the children had a supervised visit with their mother at her home in Madison County, Alabama. That visit went well and the children had fun.

23. Jennifer Haynes has been a special education teacher in the Fayetteville City Schools for more than two decades and is currently a school counselor at an elementary school in Fayetteville. In the summer of 2002, the Juvenile Court for Lincoln County asked Ms. Haynes, because she has some experience working with parents who have low intellectual functioning, to work with [Mother] and her children to see if [Mother] might be able to raise her children. Ms. Haynes met with [Mother] and observed [Mother] and her children during a visit. Ms. Haynes submitted a report, dated August 24, 2002, to the Department of Children's Services and that report is made Exhibit 1 to this Stipulation of Facts. Ms. Haynes would also testify that she asked [J. W. W.] after one of the visits, how he would feel if he could not see his birth mother again, and [J. W. W.] began to cry. [J. W. W.] told the DCS worker at one time that he wanted to go and live with his birth mother.

24. Defendant [Mother] also visits with her two children who live with the [M.] family in Alabama. She sees [those children] on at least a monthly basis either at the [M.] home, her home, or some other location in or around Decatur, Alabama. Ms. [M.] would testify that all of those visits go very well and that both children look forward to seeing their mother. The visits are observed or supervised by [M.S].

25. Ms. [M.] would testify that, although she has adopted other children who have been in her home, she and her husband have affirmatively decided that it would not be appropriate to adopt either [M. W.] or [W. W.] Ms. [M.] would testify that both [M. W.] and [W. W.] have a stable home with the [M.s] Ms. [M.] does not believe that [Mother] has the capacity to adequately raise any of her children and Ms. [M.] does not expect either [M. W.] or [W. W.] to ever go to live with their mother - at least as long as they are children. At the same time, Ms. [M.] would testify that both children have a very good relationship with their mother and that cutting off contact between mother and children would be detrimental to the children. Ms. [M.] would testify that both [M. W.] and [W. W.] know that [Mother] is their mother, but both realize that their home is with Mr. and Mrs. [M.] Ms. [M.] would further testify that she tells [M. W.], who is old enough to understand, that she is actually lucky to have two families.

26. These two children,[J. W. W.] and [M. E. W.], have been with the [Foster Parents'] home for the vast majority of their lives. According to the [Foster Mother], the [Foster Parents] are the only parents they have actually known. [J. W. W.] and [M. E. W.] consider the [Foster Parents'] home to be their home and they consider the other children in the [Foster Parents'] home to be their siblings. The [Foster Parents] consider the children to be "our children." According to the foster mother, [J. W. W.] and [M. E. W.] have a home with them as long as the children want to stay, even if the [Foster Parents] are not able to adopt them.

27. [Foster Mother] describes [J. W. W.] as a "typical little boy" who does "pretty good" with his peers. [Foster Mother] would testify that [M. E. W.] does "fairly good" at school. The current DCS worker described them as happy children who have no significant problems. Both children get along with their peers and with the other children in the [Foster Parents'] household. According to the foster mother, both [J. W. W.] and [M. E. W.] are in counseling, [J. W. W.] for his diagnosed attention deficit/hyperactivity disorder and [M. E. W.] for aggressive/passive behavior.

28. The foster parents are very interested in adopting [J. W. W.] and [M. E. W.]. [Foster Mother] would testify that she would be willing for the defendant [Mother] to continue to visit with her children after [J. W. W.] and [M. E. W.] are adopted.

29. In addition to the foster children and their own children, the [Foster Parents] raised, since he was eleven years old, another child whom they did not adopt. This child was placed in the [Foster Parents'] home by the Department of Children's Services and was later returned to a relative; after that placement did not work out, the child came back to live with the [Foster Parents] although they did not adopt him. That child is now an adult in his late teens. [Foster Mother] would testify that she and her husband have cared for this young man as if he were their own child.

In addition to the extensive stipulations, five depositions were filed with the court: Court-appointed psychological examiner Doug Mays (prepared and presented a parenting assessment of (Mother); Dr. Steve Guerin (psychologist treating J. W. W.); Sally Derington (outpatient therapist for M. E. W.); Kathy Rogers (DCS's adoption and permanency expert); and Susan Brooks (Mother's expert on permanency and alternatives to adoption).

Within one day after the filing of the stipulations, the juvenile court dismissed DCS's petition to terminate Mother's parental rights on May 23, 2003,⁴ finding:

After hearing the stipulations and arguments of the attorneys of record and review of depositions in this case, the Court finds that it is in the best interest of the children to deny the State's petition for the termination of parental rights.

The trial court did not, either in the order or in a separate memorandum, issue findings of fact or conclusions of law.

I. GROUNDS

The first requisite for termination of parental rights is the existence, shown by clear and convincing evidence, of at least one of the statutory grounds for termination. Tenn. Code Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). There is no dispute⁵ that the ground that was shown to exist in this case is that found at Tenn. Code Ann. § 36-1-113(g)(8). Subsection (A) of that provision gives courts the jurisdiction to decide if a parent is "mentally incompetent to provide for the further care and supervision of the child" and to terminate such parent's rights. The rest of the section provides:

(B) The court may terminate the parental or guardianship rights of that person if it determines on the basis of clear and convincing evidence that:

(i) The parent or guardian is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be

⁴Although the trial court signed the order on May 23, 2003, the Juvenile Court Clerk's stamp indicates the order was filed May 27, 2003. There is also another stamped entry date of June 4, 2003. DCS's brief on best interests was filed with the court on June 2, 2003. The deposition of Mother's expert, Susan Brooks, was filed the same day the order was signed denying the termination petition.

⁵Mother does not dispute that she is incapable of providing care and supervision to these children and will unlikely be able to do so. She stipulated to those facts in the trial court. In its petition to terminate Mother's parental rights, DCS alleged several grounds for termination. However, DCS has stipulated that it is relying only on the ground that Mother's mental incapacities preclude her from providing a home or care and supervision to these children, *i.e.*, Tenn. Code Ann. § 36-1-113(g)(8).

able to assume or resume the care of and responsibility for the child in the near future, and

(ii) That termination of parental or guardian rights is in the best interest of the child.

(C) In the circumstances described under subdivisions (A) and (B), no willfulness in the failure of the parent or guardian to establish the parent's or guardian's ability to care for the child need be shown to establish that the parental or guardianship rights should be terminated.

As this provision makes clear, the General Assembly has determined that a parent's inability to adequately care for and supervise a child constitutes a just basis for termination of parental rights, even though such inability is not the result of willful conduct by the parent. Even before this specific provision was adopted⁶, it was well established that a parent's mental incapacity to parent her children furnishes a ground to terminate parental rights. *State v. Smith*, 785 S.W.2d 336 (Tenn. 1990).⁷ In *Smith*, the Tennessee Supreme Court, in reversing this court's refusal to terminate the parental rights of a mentally disabled mother, observed:

The holding of the Court of Appeals in this case - - that 'mental disability' can not be the basis of termination of parental rights since the acts of the mentally disabled parent are not willful - - would nullify a significant part of the legislative plan for the welfare of dependent and neglected children. An obvious result of the holding is to condemn a child, whose parents are unfit to properly care for the child because of mental illness, to a life in serial foster homes without any possibility of a stable, permanent home.

Id. at 338.

This court has consistently found that a parent's continued incapacity to provide fundamental care for a child, whether caused by mental illness, mental impairment, or some other cause constitutes sufficient ground for termination of parental rights. *See, e.g., In re A. W.*, 114 S.W.3d 541 (Tenn. Ct. App. 2003) (holding that mother's long refusal to take medication for her mental illness was noncompliant with permanency plans and court was not compelled to defer termination to give mother a chance to demonstrate that her improvement from her recently begun medication regimen was permanent or sufficient); *In re C. J. S.*, No. 2000-02836-COA-R3-JV, 2002 WL 256799 (Tenn. Ct. App. Feb. 22, 2002) (no Tenn. R. App. P. 11 application filed) (holding that the mother's mental condition prevented her from meeting her child's needs and was a persistent condition preventing

⁶See 1995 Tenn. Pub. Acts, ch. 532, § 2, effective January 1, 1996.

⁷In *Smith*, the ground alleged was the persistence of conditions that prevented the child's safe return to the parental home.

the child's safe return home); *In re T.S. and M.S.*, No. M1999-01286-COA-R3-CV, 2000 WL 964775 (Tenn. Ct. App. July 13, 2000) (no Tenn. R. App. P. 11 application filed) (holding that the mother's limited intellectual functioning, consequent inability to provide care to her children, and inability to improve her parenting abilities, despite her obvious love for the children and attempts to improve her situation, constituted persistent conditions preventing the return of the children to the home); *In re B.B.*, No. M1999-00643-COA-R3-CV, 2000 WL 794360 (Tenn. Ct. App. June 20, 2000) (appeal denied Dec. 18, 2000) (holding that proof of the mother's limited intellectual functioning combined with her psychological problems, preventing the mother from parenting appropriately, established the grounds that her mental condition was so impaired and likely to remain so that she would be unable to resume care of the child in the near future); *In re T. J. H. and M. S. M.*, No. 01A01-9712-CH-00736, 1998 WL 313719 (Tenn. Ct. App. June 12, 1998) (no Tenn. R. App. P. 11 application filed) (holding that parents' mental illness and inability to manage their psychological disorders were persistent conditions preventing the safe return of the children to the home); *State Dep't. of Human Services v. Adams*, No. 03A01-9403-CV-00114, 1994 WL 57991 (Tenn. Ct. App. Oct. 24, 1994) (no Tenn. R. App. P. 11 application filed) (holding that parents' inability to improve their parenting skills to a level where the children could be returned home, despite efforts by social services agencies, was grounds for termination).

Of particular relevance to the case before us is the decision in *Tennessee Dep't of Children's Services v. B. J. A. L.*, No. E2002-00292-COA-R3-JV, 2002 WL 31093932 (Tenn. Ct. App. Sept. 19, 2002) (no Tenn. R. App. P. 11 application filed). In that case the mother was of limited intellectual functioning and was also diagnosed with major depression with psychotic features. It was undisputed that the mother had "numerous mental disabilities and that, in spite of her efforts in therapy, she has been unable to improve." 2002 WL 31093932, at *6. This court found that the mother's incapacities, including her inability to parent or acquire the skills to parent her child, were persistent conditions preventing the return of the child to the mother. They also were proof of the ground of impaired mental condition making it unlikely she would be able to properly care for her children in the near future. *Id.* This court noted, "while we recognize that Mother is essentially helpless to improve her mental condition and that her actions are not willful, mental incompetence is nevertheless a valid ground for terminating parental rights," citing the statute and the *Smith* decision. *Id.*

Early in the hearing in this case, the trial court stated to counsel for DCS, "Surely you're not asking me to terminate the parental rights of a parent simply because they cannot take care of these children?" As the authority set out above clearly demonstrates, both the General Assembly and the courts have determined that a parent's inability to provide fundamental care to his or her children, when that inability cannot be remedied in the near future, constitutes a ground for termination. Neither the statutory ground nor judicial holdings require willfulness. Any policy questions implicit in the trial court's statement have been decided in favor of the children's interest in a safe, stable, and permanent home.

Because the trial court based its decision on best interest, it implicitly found that grounds for termination had been proven, and the stipulated facts support that conclusion. We cannot presume

that the court's concern expressed in the statement quoted above influenced its ultimate decision to deny termination. We think an additional observation by the trial court better describes the question as he saw it and the issues presented by the parties, *i.e.*, "What would that [termination] accomplish?"

Here, Mother acknowledges that the children cannot come back to live with her on a full-time basis and does not seek physical custody of the children. She has also conceded that the record supports the finding that Mother's mental impairment provides a ground for termination under Tenn. Code Ann. § 36-1-113(g)(8)(B)(i). Having conceded that a ground exists for termination, Mother rejects DCS's argument that the law requires termination of her parental rights due to her mental incompetence. Mother insists that the law and facts of this specific case do not require this court to sever her relationship with the children.

II. BEST INTEREST

The second requirement for terminating a person's parental rights is that the court determine that clear and convincing evidence proves that termination is in the child's best interest. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d at 546. The statutory provision setting out the mental incapacity ground also separately requires that the court determine, on the basis of clear and convincing evidence, that termination of parental rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(g)(8)(B)(ii).

Once a ground for termination has been proved and found, the focus of the inquiry shifts from the rights and interests of the parent to the interests of the child. The legislature has directed how the courts are to resolve any conflicts in those interests. In setting forth the purpose of and construction to be afforded the adoption and termination of parental rights statutes, our legislature has stated:

In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child, which interests are hereby recognized as constitutionally protected and, to that end, this part shall be liberally construed.

Tenn. Code Ann. § 36-1-101(d). *See also* Tenn. Code Ann. § 37-2-401(c)(establishing legislative intent for statutes on foster care and stating, "When the interests of a child and those of an adult are in conflict, such conflict is to be resolved in favor of a child. . .").

DCS argues that, where a child cannot be returned to the parent in the near or foreseeable future, the express public policy of the State of Tennessee, established by its legislature and affirmed by the courts, is that it is in the child's best interest to be permanently integrated into an adoptive home rather than spending his or her childhood in the uncertainty of foster care. Indeed, the General Assembly has determined that one of the primary purposes for our statutory system of child removal, foster care, and adoption is "to protect [children] from needless prolonged placement in foster care

and the uncertainty it provides, and to provide them a reasonable assurance that, if an early return to the care of their parents is not possible, they will be placed in a permanent home at an early date.” Tenn. Code Ann. § 37-2-401(a). Similarly, the legislature has proclaimed that the purpose of the adoption and termination of parental rights statutes is to ensure that the interests of children in the adoptive process are protected and that adoption proceedings are held expeditiously “to enable the child to achieve permanency, consistent with the child’s best interests, at the earliest possible date.” Tenn. Code Ann. § 36-1-101(a).

Other provisions in relevant statutes support the argument that legislative policy supports termination of parental rights when, absent such termination, the child faces a future of foster care rather than a permanent home. For example, one ground for termination is that the child has been removed from the home for more than six months and, after that time, conditions still persist that prevent the child’s safe return to the parent “in the near future” and continuation of the parent and child relationship “greatly diminishes the child’s chances of early integration into a safe, stable and permanent home.” Tenn. Code Ann. § 36-1-113(g)(3). In addition, the statute regarding the contents of a permanency plan, required for every child placed in foster care, states that each plan must have a goal of (A) return of the child to parent; (B) placement of the child with relatives of the child; (C) adoption; or (D) planned permanent living arrangement. Tenn. Code Ann. § 37-2-403(a)(1). This statutory list of options for placement has been interpreted as establishing an order of preferences for placement. *Smith*, 785 S.W.2d at 338.

The legislature has identified a number of non-exclusive factors courts are to consider in making the best interest determination, many of which relate to the impossibility of the child returning to the parent’s custody in the near future. Tenn. Code Ann. § 36-1-113(i). Those factors are:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is

such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Obviously, factors (1), (2), (5), (6), (7), and (8) deal with the likelihood of the child returning to the parent's custody and home. Where such reunification has been shown to be unlikely, that must be weighed in the determination of the child's best interest.

We agree with DCS that the legislature has established as public policy that termination of parental rights, as a prerequisite to adoption, is in the best interest of a child who cannot be returned to the custody and care of the parent. Our courts have recognized this policy and the implications of denying termination in such situations: "life in serial foster homes without any possibility of a stable, permanent home." *Smith*, 785 S.W.2d at 338. Both legislative and judicial statements recognize the significance of permanency as the goal of decisions involving future placement of children and termination of parental rights.

In each of the cases discussed above where grounds were found because of a parent's inability to parent or provide care in the near future, the court also determined that termination of parental rights was in the child's best interest because the children needed the stability, security and continuity of a permanent adoptive home and "deserve a chance to thrive and grow in a loving permanent home that offers them the opportunity to reach their fullest potential. . . ." *Adams*, 1994 WL 579911, at *10. With termination, the children will "have a chance to escape the revolving door of foster care and to be placed in a permanent and stable home." *In re A.W.*, 114 S.W.3d at 548. Unless the parent's rights were terminated, the child would probably live in a foster home until majority, and "foster care, even good foster care, is not a substitute for a permanent home," and adoption was the child's only chance to be raised in a stable, permanent home. *In re C. J. S.*, 2002 WL 256799, at *5. Where the proof showed the child needed a stable, permanent home and had thrived in the stable environment of her foster home, the child's best interest was served by termination, because otherwise, "we would place the children in the endlessly hopeless situation, caught in the system with no escape." *In re B. B.*, 2000 WL 794360, at *10-11, quoting *Adams*, 1994 WL 57991, at *10.

Similarly, where the proof showed the mother was unable to parent and could not become able to parent, and where an adoptive placement was available, even though the mother loved her children and attempted to improve her abilities, termination was in the children's best interest because, as grave as such a decision was, to do other than terminate the mother's rights "would, in all likelihood, leave the children in foster care until they reach the age of majority." *In re T. S. and M. S.*, 2000 WL 964775, at *8. Proof that both children thrived in the stable environment of their foster home provided clear and convincing evidence that termination of the parents' rights would

hasten the children's early integration into a stable, permanent home. *In re T. J. H. and M. S. M.*, 1998 WL 313719, at *4. Where the child had been in foster care for over seven years, could not be returned to custody of the mother, her foster family wanted to adopt her, the mother had regularly visited with the child, but the child did not want to continue that visitation, and the child wanted to be adopted, there was clear and convincing evidence that termination was in the best interest of the child. *B. J. A. L.*, 2002 WL 31093932, at *7-8.

We agree with DCS that this court has consistently held, where a ground for termination has been proved and the child cannot be returned to the care and custody of the parent, termination of parental rights is usually in the best interest of the child because that is the only way a child can be integrated into a stable, permanent adoptive home. The alternative of the "limbo" or potentially "revolving door" of long term foster care does not usually provide the permanency and continuity that is important to a child's development. See *In re Z. J. S. and M. J. P.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *17 (Tenn. Ct. App. June 3, 2003) (no Tenn. R. App. P. 11 application filed) (discussing the need that children, particularly dependent or abused children have for stability, and holding that the alternative of long term, open-ended foster care is not in the children's best interests). Generally speaking, "[w]hen it becomes obvious that children will not be able to safely return to a parent's custody in a reasonable time frame, those children's interests may indeed be best served by terminating the rights of the parent so that the children may be adopted into a stable and nurturing home." *In re C. M. R.*, No. M2001-00638-COA-R3-JV, 2002 WL 192562, at *5 (Tenn. Ct. App. Feb. 7, 2002) (appeal denied May 28, 2002). See also *In re L. S. W.*, No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at *8 (Tenn. Ct. App. Sept. 6, 2001) (no Tenn. R. App. P. 11 application filed) (recognizing that permanent or long term foster care was not in a child's best interest); *State Dep't of Children's Services v. Hunter*, No. 1999-02606-COA-R3-CV, 2000 WL 313549, at *4 (Tenn. Ct. App. Mar. 29, 2000) (no Tenn. R. App. P. 11 application filed).

Nevertheless, we agree with Mother that a general public policy favoring adoption, which must be preceded by termination of parental rights, over long term foster care cannot substitute for an individualized determination of the best interest of the child who is the subject of the termination proceeding. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *C. J. H. v. A. K. G.*, No. M2001-01234-COA-R3-JV, 2002 WL 1827660, at *3 (Tenn. Ct. App. Aug. 9, 2002) (no Tenn. R. App. P. 11 application filed) (holding that the existence of grounds does not necessarily lead to the conclusion that termination is in the child's best interest, and an individualized consideration based on the facts of a particular situation is required). As Mother points out, in each of the cases relied upon by DCS or cited by this court above, a fact-specific determination of best interest was made and was required to be made. Although our courts have frequently determined that long term foster care, the alternative to termination and adoption, is not in the best interest of the child, each situation must be analyzed according to the facts of the case, the statutory factors listed in Tenn. Code Ann. § 36-1-113(i), and any other relevant factors, including the effect of termination on the child.

This court recently undertook such an individualized analysis in a case with some factual similarities to this case, and the members of the panel differed on the conclusion. In *In re R. L. H.*, No. M2002-01179-COA-R3-JV, 2003 WL 21266732 (Tenn. Ct. App. June 3, 2003) (no Tenn. R.

App. P. 11 application filed), all members of the panel agreed with the trial court that grounds for termination had been proved by clear and convincing evidence. The mother's mental impairments and intellectual functioning prevented her from providing the minimal levels of care and protection required by her son with special needs, and it was unlikely her limited capabilities would ever improve so that she could properly care for the child. With regard to the child's best interest, the court found that the child was twelve years old and had specific learning, speech and behavioral problems, requiring continued counseling and therapy; that he was in a therapeutic foster home under the care of trained foster parents; and that he was enrolled in school, making improvement in his behavior problems, and adapting well. The court also found that although the mother could not provide a suitable home, the mother and child had regular visits; that there had been bonding between them; and that the child was anxious to continue these visits.

On the basis of these factual findings, the majority held that termination of the mother's parental rights was in the child's best interest, primarily because, due in part to his age, the continuation of the parent-child relationship greatly diminished his chances of early integration into a stable and permanent home. *Id.* at *10-11. With regard to the relationship between the mother and the child the majority noted that "the development of a 'relationship,' without more, is an insufficient basis to support a finding that [termination] is not in the best interest of [the minor child] . . ." *Id.* at *10, quoting *Tenn. Dep't of Children's Services v. D. G. B. and C. B.*, No. E2001-02426-COA-R3-JV, 2002 WL 31014838 (Tenn. Ct. App. Sept. 10, 2002) (no Tenn. R. App. P. 11 application filed).

One member of the panel dissented from the majority's conclusion that termination of the mother's parental rights was in the best interest of the child. *Id.* at *11-13 (Crawford, dissenting). The dissent found that the child was in need of continued special counseling and therapy and that the therapeutic foster home in which he had lived for several years had served as a stable and supportive environment for the child. He was also benefitting from the special education curriculum in his local school. The dissent found that "[t]he positive and stable influence [the child] receives from his foster home and special education classes is further strengthened through regular supervised visitations with [his mother]," and relied on a witness's description of the affection and love between them. *Id.* at *12.

Consequently, the dissenting judge found that the "care, supervision, and training provided in the foster home and school programs, combined with the documented fulfillment and joy the child experiences through regular visitations with his mother, has created a stable 'home' environment that serves as an emotional anchor for the child." *Id.* The dissent was concerned that termination of the mother's rights could severely disrupt that stability. While recognizing there was no proof in the record that termination would have such an effect, the dissenting member of the court suggested that a psychological evaluation of the child would be helpful in determining whether termination would have an adverse effect on the child. He also pointed out there was no evidence that the mother's condition or the visits had a negative effect on the child. Finally, the dissent noted there was nothing in the record to indicate the child was subject for adoption or had reasonable prospects for adoption.

Based upon the child's age and special needs, the dissenting member was not optimistic about the child's adoption possibilities. He concluded:

Therefore, under the exceptional circumstances of this case, to deprive [the child] of his only natural family relationship, a relationship that the child has expressed an unequivocal desire to maintain, without any evidence of adoption prospects, would not be in his best interest.

Id. The dissenting judge believed that continuation of the present situation, including supervised visits with the mother, would be in the child's best interests, primarily because of the potentially damaging effect of the destruction of the child's hope of being reunified with his mother.

In the case before us, Mother takes a similar position. She argues that the record clearly shows that the children have a stable home. They have been with their foster parents for nearly seven years; the foster family considers them to be part of the family and the children consider the foster family to be their home. The foster parents are committed to providing a loving home for the children and have made it clear that the children can stay with them as long as they want, even if they can not be adopted.

Acknowledging that permanency and stability are essential for children, Mother argues that leaving the current situation as it is will achieve those desired results. She asserts that DCS's position is that the parent-child relationship must be dissolved so that the children can be adopted into a home where they already enjoy care, stability, and love. She argues that the facts do not support the conclusion that termination of her parental rights is in the best interest of the children, but, instead, that their interest is served by continuing the status quo. Alternatively, she asserts that other arrangements, short of termination of parental rights and adoption, would protect her rights, the children's interests, and the attachments of all concerned. Mother insists that a legal guardianship or a planned permanent living arrangement are viable alternatives to adoption for the children.

On the other hand, DCS argues the benefits to the children of adoption and relies on the foster parents' statements that they will allow visits with the mother to continue. Integral to an analysis of the positions of both sides, as well as the expert depositions, is an understanding of Tennessee law regarding adoptions and termination of parental rights. Despite the foster parents' assurances that Mother will still be allowed contact with her children, she realizes she would have no enforceable right if the adoptive parents changed their minds.

The adoptive parents of a child shall not be required by any order of the adoption court to permit visitation by any other person, nor shall the order of the adoption court place any conditions on the adoption of the child by the adoptive parents. Any provision in an order of the court or in any written agreement or contract between the parent or guardian of the child and the adoptive parents requiring visitation or otherwise placing any conditions on the adoption shall be void and of no effect

whatsoever; provided, that nothing under this part shall be construed to prohibit "open adoptions" where the adoptive parents permit, in their sole discretion, the parent or guardian of the child who surrendered the child or whose rights to the child were otherwise terminated, or the siblings or other persons related to the adopted child, to visit or otherwise continue or maintain a relationship with the adopted child; and provided further, that the permission or agreement to permit visitation or contact shall not, in any manner whatsoever, establish any enforceable rights in the parent or guardian, the siblings or other related persons.

Tenn. Code Ann. § 36-1-121(f).⁸

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger, and of

severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian. The parent or guardian shall have no further right to notice of proceedings for the adoption of that child by other persons and shall have no right to object to the child's adoption or thereafter to have any relationship, legal or otherwise, with the child. . . .

Tenn. Code Ann. § 36-1-113(l)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *M. L. B. v. S. L. J.*, 519 U.S. 102, 119, 117 S. Ct. 555, 565 (1996) (quoting *Santosky*, 455 U.S. at 787, 102 S. Ct. at 1412 (Rehnquist, J., dissenting)).

Under Tennessee law, these children cannot be adopted by Foster Parents or any one else unless Mother's parental rights are terminated. If such termination occurs, Mother's relationship with the children is legally severed, and she will have no right to contact or visit the children, although the adoptive parents may permit such visits. The question of the children's best interest must be analyzed in this context.

Also relevant to an analysis of the best interests of these particular children is consideration of the alternatives to adoption proposed by Mother. Legal guardianship is recognized in Tennessee law although it is not listed as an alternate permanency goal for children in foster care. It is not clear

⁸According to the Director of the Center for Adoption, DCS or the Center has a policy on "ongoing contact with significant others" whereby DCS determines whether continuing contact with a person, such as a sibling, former foster parent, or even biological parent, is in the child's best interest. If so, DCS or the Center will meet with prospective adoptive parents to try to work out the parameters of such an arrangement. However, both the Center and DCS recognize that after an adoption is final, the parents could change the arrangement because those parents have ultimate decision-making authority regarding the children.

if such an arrangement could be considered a form of “planned permanent living arrangement.” As set out earlier, the statute on permanency plans lists “planned permanent living arrangement” as one of the alternative goals for such plans. Tenn. Code Ann. §37-2-403(a)(1)(D). It is also an acceptable goal for a child who is in foster care as a result of a surrender of termination of parental rights, Tenn. Code Ann. §37-2-403(b)(2)(C), but in that situation, specific reasons must be included in the plan for that goal as opposed to the goals of placement with a relative of the child or adoption. Further, in permanency hearings subsequent to approval of the original permanency plan, when a permanency plan goal is placement in another planned permanent living arrangement, that goal is only appropriate where DCS has documented “a compelling reason for determining that the other goals would not be in the best interests of the child because of the child’s special needs or circumstances.” Tenn. Code Ann. § 37-2-409(b)(1).

The legislature replaced “long term foster care” with “planned permanent living arrangement” in 2002. However, we find no statutory definition of the term “planned permanent living arrangement” or any other explanation of the intent of the change. The Director of the Center for Adoption equated such an arrangement with long term foster care, whereby the child remains in the custody of DCS with its advantages and disadvantages, but with a greater emphasis on “connections.” She also testified that DCS has an internal policy that a planned permanent living arrangement would not be considered for a child under the age of 15.

Mother cites to federal law, the Adoption and Safe Families Act, as providing for permanence through alternatives to adoption such as legal guardianship and placement in a permanent, but non-adoptive home. Mother asserts that the federal law references planned permanent living arrangements as a form of guardianship with permanency for a child, citing 42 U.S.C. § 675(5)(C), and that the implementing regulations suggest that a planned permanent living arrangement is appropriate in the situation where the parent is unable to care for the child because of a disability and the foster parents are committed to raising the child to the age of majority and to facilitate visitation with the disabled parent, citing 45 C.F.R. § 1356.21(h)(3)(ii).

The record before us is deficient in supplying us or the trial court with DCS’s interpretation of “planned permanent living arrangement” or its implementation of the legislative change. We do not know the contours of such an arrangement or how DCS decides whether such an arrangement is appropriate in a particular situation. What we do know is that the legislature has recognized such an arrangement as a suitable permanency plan goal and suitable arrangement for children whose custody has been removed from their parents. We also know that it is lower on the list of preferences for placement than adoption.

III. PROOF AND FINDINGS

The stipulated facts address the children's best interest in some ways. However, as the trial court recognized, the expert testimony would provide more relevant information.⁹

Kathy Rogers, the Director of the Center for Adoption testified generally as to the benefits to a child of the permanency provided by adoption. A foster child remains in the custody of the state, and representatives of the state must participate in many decisions that would otherwise be left solely to the parents. DCS has control over where the child lives, what school he or she attends, and whether the child can travel out-of-state with the foster family. If the child needs medical treatment, DCS must approve it and requires referral to a health care professional. A child in school is identified as in custody of the state, and an appointed surrogate parent works out school issues. If there is an M-team meeting, someone from the State must be there.

Ms. Rogers stated that children in foster care recognize they are different because of the state's involvement, because they do not have the same last name as the foster parents they live with, and because of other people's reactions. Adoption gives children a sense of security and belonging because of the permanent commitment made to them by their adoptive parents. When children are adopted, they are sometimes able to "free up energies that had previously been devoted to trying to sort out their life into planning for the future, developing goals, and having a greater sense of satisfaction feeling that commitment."

Mother's expert, Susan Brooks, is a law professor who specializes in adoption alternatives. She testified that children will feel secure if they are in a permanent situation, even if it is not adoption, and if that permanency is effectively communicated to them.

The depositions most focused on the best interest of the two children were given by their individual counselors.

Dr. Stephen Guerin began seeing Mother's son, J.W.W., in 2000 when he was in first grade. The initial purpose of the sessions was to assess whether J.W.W. had A.D.H.D. By the time of the deposition, Dr. Guerin had seen J.W.W. fifteen times over the preceding two years. Dr. Guerin stated that J.W.W. is "very ambivalent about his mother" but "very attached." He stated he would favor adoption because kids "stay confused" when they see their parents while in foster care, and it is "not a helpful process" for a child to visit a parent and then go back to his foster home. Adoption is a "tremendous emotional anchor for a child and crucially important to their personality development" that becomes more important as the child grows up. Dr. Guerin further testified:

⁹Because there was no trial and all of these witnesses testified by deposition, it is unclear what testimony the trial court would have admitted as expert testimony. Both Ms. Rogers and Ms. Brooks were offered as experts but were never qualified by the trial court. Opposing counsel objected to both women's testimony. Likewise, there were various objections to the testimony given by Dr. Guerin and Ms. Derington. Because the trial court made no specific rulings or findings on best interest, it is impossible for us to determine what weight if any the trial court afforded the witnesses.

I would favor adoption, and that's my personal view based on being his psychologist of record and interacting with this child for over two years. It's -- it gives him permanency, predictability, stability. It confers all of the psychological attributes for a secure attachment.

And I think that if for some reason his placement with -- or if he was not to be adopted, . . . it would be very difficult for him, and I could see some problems coming out of being in kind of no-man's-land and not knowing where you belong and where you're going to conceivably wake up tomorrow morning.

I think it's [adoption] very important for him emotionally. As I understand it he has been with the foster parents since the age of two all but I think for some period of six months or so. And to disrupt that process now would be very difficult for him. And I can't tell you exactly how he would react negatively or what we would do, but I think it would be a significant setback for him.

Well, I think that it would be, and it's just my opinion, in his best interest for him to have a sense of - permanency and belongedness.

Sally Derington is a Senior Psychological Examiner who is the daughter's outpatient therapist. She first saw M.E.W. in June 2002, and has seen her fourteen more times. The daughter was referred by the school because she cried easily and was anxious. She was diagnosed with "reactive attachment disorder."

M.E.W.'s problems arose from the first three months of her life when she was neglected. M.E.W. never includes Mother in pictures of her family or in groupings of stuffed animals. In fact, M.E.W. never calls Mother "mother," she calls her "[J.W.W.]'s mom." Ms. Derington sees no attachment between the two. Moreover, M.E.W.'s anxiety level goes up after a visit with Mother when Mother tells her she is going home with her. M.E.W. told her she didn't want to go, she wanted to stay with her foster mother. Having said this, Ms. Derington said M.E.W. is comfortable with her Mother like a child would with an extended family member seen at reunions. To that end, Ms. Derington thinks it would be good to keep some ties with Mother.

Ms. Derington thinks M.E.W. views her foster mother as her mother, but M.E.W. knows it is not permanent. Ms. Derington testified:

Her perception of the placement is not as permanent, not as secure and stable as it could be. I think that [M.E.W.] notices when [Foster Parents] have to pull in other people when they are making decisions about health, or school, or things like that, I think that she's old enough to notice that. I think that when there are comments made like you'll get to come home, that that affects [M. E. W.'s] perception of the

stability of her placement. I think that -- well, there's just a difference in the way that [Foster Parents] have to parent when they're foster parents, a difference from the way that they would be allowed to parent if they were adoptive parents. And I think . . . that is something that [M. E. W.] can perceive, maybe not understand but perceive.

Some of those are that children, a child, may be identified as being different because their name is different from their family which brings up questions of who are your parents, who is your mother, why didn't your parent want you, what did you do wrong, could be any of those things, where families also have to get permission or share permission getting medical treatment and traveling, where another party can make the decision about where the child can actually live and those determinations. There is a third party always in the life of a child, and the decisions are not made just within the normal confines of a family which is most typical in our society.

. . .

At eight, and for [M. E. W.] I'd say six to eight, okay, as far as her developmental level and cognitive level. In that age range she is beginning to understand the rules, okay, of society and what's right and what's wrong, and what's allowed, and what's not fair. So, in that way she's going to understand - it's going to be her job in the next few years to develop an understanding of the kind of decision that we're talking about the family making and of why they made a decision to include her in their family or a decision to keep her at the level that she is. There's that, and the other thing is her - she is finishing first grade, and her status in grade school will - she will see herself and her place in her family reflected in her peers' eyes more and more so that she will - she will hear that she's a foster child, or that she's an adopted child, or that she's a member of the family or not because that's the way elementary school kids are and that's the way small towns are. So, it will be more relevant to her in the next few years what her status in the family is. Those are the things that I can think of that would apply to developmental - and that would - adoption would appear to her as reflected back from her peers as more stable, yeah, and more - more - she would be more included, more a member than she is, more a member of the family than she is as a foster child.

Thus, both of the children's treating therapists supported adoption, although it is not clear whether the question was put to them in the context of the law as explained above. The opinions do not directly address the question of best interest in the context of the alternatives that may be available.

Because the decision to terminate parental rights affects fundamental constitutional rights and carries grave consequences, courts must apply a higher standard of proof when adjudicating termination cases. To justify the termination of parental rights, the party seeking termination must prove both the grounds for termination and that termination is in the child's best interest by clear and

convincing evidence. Tenn. Code. Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. “This heightened standard . . . serves to prevent the unwarranted termination or interference with the biological parents’ rights to their children.” *In re M. W. A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546; *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992); *O’Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995). Such evidence should produce in the fact-finder’s mind a firm belief or conviction as to the truth of the allegations sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *In re C. W. W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is “highly probable” as opposed to merely “more probable” than not. *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1977); *In re C. W. W.*, 37 S.W.3d at 474; *see also Estate of Acuff v. O’Linger*, 56 S.W.3d 527, 537 (Tenn. Ct. App. 2001). Consequently, it was the burden of DCS to present “evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn by the evidence.” *In re Valentine*, 79 S.W.3d at 539.

Because of the constitutional implications, gravity of consequences, higher standard of proof, and requirement of individualized decision making, our legislature has explicitly required that courts making termination decisions “enter an order which makes specific findings of fact and conclusions of law” in termination cases. Tenn. Code Ann. § 36-1-113(k). These findings of fact and conclusions of law facilitate appellate review and promote just and speedy resolution. Without such findings and conclusions, this court is left to wonder on what basis the court reached its ultimate decision. The trial court is in the best position to make findings of fact. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

Where, as in this case, the trial court has failed to make the findings of fact and conclusions of law required by Tenn. Code Ann. § 36-1-113(k), the case must be remanded to the trial court for preparation of those findings and conclusions. *In re C.M.M. and S.D.M.*, No. M2003-001122-COA-R3-PT, 2004 WL 438326, at *5 (Tenn. Ct. App. March 9, 2004); *In re K. N. R.*, No. M2003-01301-COA-R3-PT, 2003 WL 22999427 (Tenn. Ct. App. Dec. 23, 2003) (no Tenn. R. App. P. 11 application filed); *In re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, *3 (Tenn. Ct. App. Nov. 25, 2003) (no Tenn. R. App. P. 11 application filed).

Although the suggestion was made at oral argument that we treat the stipulated facts as the trial court’s findings of fact, those stipulations fall short of proof sufficient to make a best interest determination. The sometimes inconsistent proof in the depositions filed in this case requires resolution by the trial court making factual findings. So does the statute.

Because the trial court failed to make the required findings of fact as to the children’s best interest, we must vacate the order denying termination and remand the case for the preparation of

the required findings and for any further proceedings that may be necessary, consistent with this opinion.¹⁰ Costs of this appeal are taxed equally between the parties.

PATRICIA J. COTTRELL, J.

¹⁰The stipulated facts establish the ground for termination by clear and convincing evidence, and neither party has asked to revisit that issue.